92-949

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.)
JOSE A. PURCELL

Petitioners

versus

THE COMMONWEALTH OF PUERTO RICO;
HON. MILAGROS RIVERA GUADARRAMA;
HON. LUIS SAAVEDRA SERRANO;
HON. CARLOS RIVERA MARTINEZ

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether The Supreme Court Of The Commonwealth Of Puerto Rico Committed Clear Error In Failing To Conclude That First Amendment Standards Of Openness Set Forth In Press-Enterprise II Apply To Rule 23 Preliminary Hearings As Held In Puerto Rico; And Failing To Declare Mandatory Closure Unconstitutional For Being In Contravention With Such First Amendment Standards.

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

COMMONWEALTH OF PUERTO RICO

Petitioners, Caribbean International News Corp., El Vocero de Puerto Rico and José A. Purcell,[1] respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico entered in this action for declaratory and injunctive relief on July 8, 1992.

I- OPINIONS BELOW

A certified translation of the majority and two dissenting Opinions of the Supreme Court of Puerto Rico, which at this time have been published in the

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[1]Caribbean International News Corp. is a Puerto Rico corporation with offices in San Juan, which publishes the newspaper El Vocero de Puerto Rico; José A. Purcell is its employee. Other parties to this case in the lower court were: the Commonwealth of Puerto Rico, and local district judges Milagros Rivera Guadarrama, Luis Saavedra Serrano and Carlos Rivera Martínez.

Spanish language (92 JTS 108), is included in the Appendix ("App.") hereto. The Court confirmed the judgment of San Juan Superior Court, which is unpublished.

No evidentiary hearing was requested by the parties hereto, since the facts were not in controversy.

II- JURISDICTION

The judgment of the Supreme Court of the Commonwealth of Puerto Rico, affirming the Superior Court dismissal of Petitioners' request for declaratory and injunctive relief, was entered on July 8, 1992. A petition for rehearing (reconsideration) was denied by Order entered and notified on August 19, 1992. App. 239. This Petition for Writ of Certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1258.

Petitioners inform that the federal

questions sought to be reviewed were raised even before filing of the original complaint, since request for access was specifically based on First Amendment. App. 4.

III- CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution: "Congress shall make no law...abridging the freedom of speech, or of the press...."

Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Rule 23 of the Puerto Rico Rules of Criminal Procedure, 34 L.P.R.A. Ap.II, which establishes the procedure in

preliminary hearings to be held in felony cases: In pertinent part, paragraph (c) reads: "The hearing shall be private unless at the commencement thereof the person requests that it be public."

IV- STATEMENT OF THE CASE

A. Preliminary Statement

As a threshhold matter, Petitioners wish to alert this Court to the existence of parallel litigation in the federal forum. On January 31, 1992 an Opinion and Order was issued by the U.S. District Court for the District of Puerto Rico, Rivera-Puig v. García Rosario, reported at 785 F.Supp. 278. On appeal, the First Circuit heard oral argument on November 4, 1992.[2] The case is ready for resolution.

[2]The Commonwealth Solicitor General conceded that factual determinations by the district court were uncontroverted. As to "the merits" of closure, the Solicitor referred to the majority opinion of the Court below as "her position."

The First Amendment aspects of the federal litigation and the present case are identical. Both seek the prospective declaration of unconstitutionality of Rule 23(c) closure.[3] The district court ruled that mandatory closure "flagrantly and patently violates" Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).[4] Id. at 292.

[3]Preliminary hearings "shall be private, unless at the commencement thereof the person requests that it be public." App. 89, n.25.

[4]The following factual conclusions are uncontroverted:

> [T]he preliminary hearing in Puerto Rico has many of the same characteristics as those conducted in California. The hearings are held before a detached neutral magistrate; both prosecutor and defense counsel are present; evidence may be presented by both sides, including exculpatory evidence by the accused; witnesses are heard and can be cross-examined; and based on the evidence, the magistrate will either hold the accused over for trial or exonerate and set him or her free. It is clear that the magistrate is performing an adjudicative function in

The Court below was informed of the federal decision and the appeal taken. The district court noted the pendency of the present case. See, 785 F.Supp. at 282. The potential exists for further state-federal conflict; Rivera Puig is incompatible with the ruling issued by the Supreme Court.

B. Statement of Facts

El Vocero[5] de Puerto Rico is the newspaper with the largest circulation in Puerto Rico. It is well known for its coverage of judicial and police matters. José A. Purcell, while covering the San Juan District Court for El Vocero on

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the preliminary hearing and, like California, this hearing may be the only formal judicial proceeding, both in the cases where the accused pleads guilty and in those cases where no probable cause is found. (Underlining ours). Id. at 289.

[5]In Spanish, a "vocero" is a spokesman.

October 31, 1989, requested access[6] to preliminary hearings to be held that day pursuant to Rule 23. The three judges who would hold preliminary hearings that day, Respondents herein, denied access without a hearing. All preliminary hearings were held behind closed doors, as is the usual practice in Puerto Rico since 1964.

C. Procedural History

Petitioners filed for prospective declaratory and injunctive relief in San Juan Superior Court, basing the petition on First Amendment grounds. The motion for dismissal filed by Respondents was granted. App. 7. Civil appeal AC-90-181 was filed on March 2, 1990, and on February 1, 1991 the case was submitted.

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[6]He based his request specifically on First Amendment presumptive openness, and requested that if access was denied, then that "the proceedings to be conducted be recorded and that a record be made to which we may have access." App. 4.

On July 8, 1992 the Supreme Court held that Press-Enterprise II does not apply to Rule 23 preliminary hearings,[7] because they are held in the "judicial investigative stage of the proceedings," while Press-Enterprise II deals with the "adjudicative stage." App. 166-167.

Rivera Puig was not noted.

REASONS FOR GRANTING THE WRIT

The Supreme Court Of The Commonwealth Of Puerto Rico Committed Clear Error In Failing To Conclude That First Amendment Standards Of Openness Set Forth In Press-Enterprise II Apply To Rule 23 Preliminary Hearings As Held In Puerto Rico; And Failing To Declare Mandatory Closure Unconstitutional For Being In Contravention With Such First Amendment Standards.

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[7]The majority (4-3) opinion was written by Judge Naveira de Rodón. A dissenting opinion was issued by Judge Hernández Denton, App. 171-227, joined by Judge Negrón García, who also issued a separate one, App. 228-238. Judge Rebollo dissented without written opinion.

1. Similarities between Rule 23 preliminary hearings and preliminary hearings held in California.

The First Amendment question "cannot be resolved solely on the label we give the event, i.e. 'trial' or otherwise."[8] We begin by pointing out roughly twenty (20) similarities between the California preliminary hearing described in Press Enterprise II, and Rule 23 preliminary hearings as actually held in Puerto Rico.

The foregoing similarities are due to a common ancestry,[9] and because through the years California case law has been consistently cited as persuasive, since it

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[8]478 U.S. at 7. This Court ignored California's insistence that its hearing was a "pretrial proceeding" and not part of the trial.

[9]The Judicial Conference of 1958 cited as "sources of origin" the federal rules and "the California Penal Code, in its procedural part." App. p.93 n.26.

is "the state from where our Code of Criminal Procedure was directly derived." Hernández Ortega v. Superior Court, 2 Off.Trans. 990, 993 (1974).

First, let us see the extent to which we find in both proceedings those elements identified in Press-Enterprise II which made that proceeding resemble a trial.

Both are held before a neutral, detached magistrate, who performs an adjudicative function as judge, not as investigator or as interested party. People v. Opio Opio, 4 Off. Trans. 65 (1975); Young v. Superior Court, 253 Cal.App.2d 848 (1967); Gerstein v. Pugh 420 US 103 (1975). The judge must rule on issues of law as applied to the facts of each case. Id. The accused may appear assisted by counsel, who has the right to cross-examine witnesses, present evidence, and otherwise defend his client within the

usual procedural formalities of a bench trial. App. 114-115. Neither proceeding is similar to a grand jury investigation. People v. Rodríguez Aponte, 16 Off.Trans. 850 (1986); Press-Enterprise II.[10] The accused may present exculpatory evidence, as well as certain defenses, such as non-chargeability by reason of insanity. People v. Vélez Pumarejo, 13 Off.Trans. 455 (1982); Hernández Ortega v. Superior Court, supra, following Jennings v. Superior Court of Contra Costa County 59 Cal.Rptr. 440, 428 P2d 304 (1967).

Secondly, we compare the scope and purposes of the proceeding.

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[10]The need for secrecy of grand jury proceedings is addressed. However, "Other proceedings plainly require public access." 478 U.S. at 9. See, 1 La Fave, Criminal Procedure §1.6; Note, The Preliminary Hearing - An Interest Analysis, 51 Iowa L.Rev. 164 (1965); Comment, Preliminary Examination - Evidence and Due Process, 15 Kansas L.Rev. 374 (1967).

The main purpose of the hearing is to determine probable cause to hold over for trial, or dismissal of the charges if that is called for. People v. Rodríguez Aponte, supra; People v. Uhlemann, 511 P.2d 609 (1973).[11] Ultimate guilt or innocence of the accused beyond reasonable doubt is not decided at this stage; the hearing offers the district attorney the opportunity to show that there exists probable cause to believe that an offense has been committed and the accused committed it. People v. Figueroa Castro, 2 Off.Trans. 352 (1974); §866 Cal. Penal Code. App. 57. The quantum of proof is clearly different from that required at trial. People v. Figueroa

[11]The hearing "determines essentially whether a trial is necessary." Wharton, Criminal Procedure §138. The hearing is designed as a screening mechanism. 1 La Fave, Criminal Procedure §1.4. In both jurisdictions, probable cause can be found for a lesser charge.

Castro, supra; Vázquez Rosado v. Superior Court, 100 PRR 591 (1972); 4 Witkin, California Criminal Law §1982, at p. 2342. The district attorney does not have to submit all the evidence he has at this stage; he can rest when in his sole discretion sufficient evidence has been presented. People v. Vélez Pumarejo, supra; McDaniel v. Superior Court, 55 Cal.App.3rd 803 (1976). The prosecutor can file a second time if he does not prevail, or seek judicial review from a higher court. P.R.Cr. Rule 24, 34 L.P.R.A. Ap.II; People v. Félix Avilés, 91 JTS 50; People v. Uhlemann, supra; §871 Cal. Penal Code.

Due process safeguards have been made applicable throughout the proceeding to minimize the possibility of an individual being submitted arbitrarily to the rigors of trial. People v. López Camacho, 98 PRR 687, 689 (1970); Jennings v. Superior

Court, supra; Jones v. Superior Court, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971).[12] In both jurisdictions, the hearing must be held within "speedy trial" limitations. People v. Opio Opio, supra; P.R. Cr. Rule 64(n)(4) and (5); §825 Cal. Penal Code; County of Riverside v. McLaughlin, 111 S.Ct 1661, 114 L Ed.2d 49 (1991). The accused may waive the preliminary hearing, an unlikely event if its purpose were to investigate him. Evidence rules are

[12] In Hernández Ortega the Puerto Rico Supreme Court compared the Rule 23 proceeding with the California hearing:

> The preliminary hearing...is the threshold of the due process of law, and the clear language, the call for the strength and scope that the lawmaker intended it to have, shapes it open to hear and decide on any defense raised by the defendant, not affecting thereby the governing principle that the degree of evidence required for determination of cause is of a minimum standard and not that one needed to support a conviction. 2 Off. Trans. at 1000. (Underlining ours).

followed substantially but flexibly in both jurisdictions. Rule 23; People v. Esteves Rosado[13], 10 Off.Trans. 424 (1980); People v. Schuber, 71 Cal.App.2d 773, 163 P 2d 498 (1945); § 872.5 Cal. Penal Code. The People must provide to the accused the sworn statements of witnesses against him. In Puerto Rico, copies of the documents are provided; in California, the judge reads the statements to the accused. Rule 23(c); §864 Cal. Penal Code. If the accused desires to discover evidence not used in the hearing against him, he may use other discovery mechanisms which are available after the hearing is held. People v. Rodríguez Aponte, supra; Hawkins v. Superior Court, 22 Cal.3rd 584, 586 P 2d 1916 (1978); People v. Superior Court,

[13] "[W]e have not understood as necessary passing judgment" on the matter. App. 121.

264 Cal.App.2d 694 (1968).[14]

Due to dismissal of charges, and the plea bargaining generated after a finding of probable cause, often the hearing is the only opportunity for the public and the press to observe the functioning of the criminal process and the government officials involved. People v. Cruz Justiniano, 16 Off.Trans. 35 (1984); San Jose Mercury-News v. Municipal Court, 30 Cal.3rd 498 (1982).[15]

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[14]"The prevailing view is that the preliminary hearing is not to be used as a discovery device." 2 La Fave, Criminal Procedure §14.1.

[15]See, Press-Enterprise II, 478 U.S. at 12, citing Waller v. Georgia, 467 U.S. 39, at 46-47 (1984). The annual reports of the Judicial Conference are public. Judge Hernández Denton notes, App. 205 n.6, that in 1989-1990 29 percent of the preliminary hearings resolved represented the last contact of the accused with the criminal justice system. The total number of hearings resolved in that and the previous two years is 89,781; total dismissed or no probable cause found: 25,654. Overall average: 28.6%.

2. Differences pointed out by the Court below between both proceedings.

A "detailed comparative analysis" of both proceedings is seen as crucial by the Court below:

> If the result of this analysis were that our preliminary hearing is an extensive and elaborate one, sufficiently alike to a trial on the merits as the California one, the precedent set in Press-Enterprise II would be fully applicable. On the other hand, if we are before a preliminary hearing which, by its nature and functioning, resembles a hearing of the judicial investigative type, then Press-Enterprise II would not be applicable to it. App. 37-38.

Before the Court addresses the differences between both proceedings, it concedes important similarities: the judge is neutral and not a party; the accused can be present and assisted by counsel; counsel for the parties can cross-examine adverse witnesses; the defendant can offer evidence on his own behalf; the purpose of

the hearing is not to establish ultimate guilt, but to bind over for trial or dismiss the charges. See, App. 113.

Compare the above characteristics with those which made this Court call the California hearing "elaborate":[16]

> The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence...If the magistrate determines that probable cause exists, the accused is bound over for trial; such a finding leads to a guilty plea in the majority of cases. (Citations omitted). 478 U.S. at 12.

The Court then expresses that "even in those points of apparent coincidence there are distinctions important to emphasize." App. 116. (Underlining ours.)

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[16]The Court below is aware of such observations. However, it evades a head to head comparison. It dares not go beyond the label and comment what this Court meant with the word "elaborate." It simply mentions that California has an "entire chapter" on the hearing procedure. App.40.

The first distinction relates to the presentation of exculpatory evidence on the part of the accused, which "is not unrestricted." App. 116-119. The accused "shall make a prima facie showing that the witness can contribute exculpatory evidence which... would defeat the consideration of probable cause for indictment." People v. Rodríguez Aponte, supra. The expected argument is that such evidence can be presented without any restriction in California, but such is not the case. California §866 requires a proffer of proof, sufficient to convince the judge that "the testimony would have the reasonable probability of establishing an affirmative defense...." Compare n. 32-33, App. 117-119. In both jurisdictions, the accused may be limited by the judge in the presentation of exculpatory evidence.

Both are "not unrestricted."

Another "distinction" pointed out is the right of the accused in Puerto Rico "to receive copies of the sworn statements of the prosecuting witnesses." App. 120. The California procedure is based on reading the statements to the accused. Again, the distinction is procedural, and to our way of thinking, providing copies of perhaps lengthy documents is more desirable for the accused, during and after the hearing. The important point is that in both jurisdictions there is some discovery, although limited, at this stage.

Another "distinction" is the procedure to be followed if there is no probable cause found. App. 126-128. The prosecutor in California can only go to Superior Court to revise matters of law; in Puerto Rico he has a **de novo** hearing in Superior Court, in which he can submit the

same, additional or different evidence. The difference is procedural; the judicial review available to the district attorney <u>after</u> the hearing, in no way can affect the nature of the hearing itself.

All the distinctions are procedural. The Court concludes: "our preliminary hearing, contrary to the one conducted in California, is a <u>limited</u> proceeding, of an <u>investigative</u> judicial nature, that <u>does not sufficiently resemble a trial</u>[17] as to be applicable what was resolved in <u>Press Enterprise II</u>." App. 129.

The Court does not set forth in what sense the hearing is called "limited", or in relation to what. Also, it fails to state who investigates during the hearing,

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[17]The Court fails to analyze the elements it identified at App. 114-115, which are seen as decisive in <u>Press-Enterprise II</u>.

or how.[18] Press-Enterprise II frowns upon the usage of labels. Stripped of those affixed by the Court below, and focusing on how the hearings function, they are substantially identical.

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[18]Judge Hernández Denton, on the majority's conclusion that Rule 23 hearings are "investigative", states:

> The majority's position is based on the premise that in Puerto Rico the preliminary hearing "is performed during the judicial investigative stage." The fallacy of this position is evident. In our code of criminal procedur[e], the function of the courts is adjudicative and not investigative. To whom the function corresponds, of investigating the criminal acts, is the Office of the prosecutor.... When making its determination the Court "finds itself between parties not as an interested party but as a judge. In its objective and function, said hearing is judicial. So must be the essence of its procedure." Wright, Federal Practice and Procedure, 2nd Ed., Vol. 1, p. 181 (1982). (Emphasis in the original). App. 208-209.

3. First Amendment rights are guaranteed in Puerto Rico to the same extent as the 50 States.

"The First Amendment applies in Puerto Rico." Posadas de P.R. Association v. Tourism Co. 478 U.S. 328, 331 n.1 (1986), and cases cited therein. Further, interpretations of fundamental[19] First Amendment rights by this Court are binding on all branches of the Commonwealth Government, to the precise extent as any State government.[20] Certainly, the Court

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[19]See, generally, Mills v. Alabama, 384 US 214, 218-219 (1966) Grosjean v. American Press Co., 297 US 233 (1936).

[20]Narrowing constructions of state substantive law by Commonwealth courts are respected because "(t)his would certainly be the rule in a case originating in one of the 50 States." Posadas, 478 U.S. at 339. See, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 672-673 (1974). No such deference should be expected with respect to First Amendment access by the Court below. Press-Enterprise II is a fine example of this concept: the California state-law label of "pretrial proceeding"

says that if our preliminary hearing is similar to the one that this Court had before it in Press-Enterprise II, that case would apply "fully". App. 37.[21]

However, in the citation of Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970), App. 63, and Balzac v. Porto Rico, 258 U.S. 298 (1922), App. 82, we see the thrust of certain expressions as implying that in Puerto Rico First Amendment rights should not or do not receive the same recognition they receive from other states because of an interest in "the formation of an autochthonous system adjusted to our

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was specifically noted and then ignored. See generally, Vol. I Rotunda and Nowak, "Treatise on Constitutional Law, Substance and Procedure", §§1.5-1.6 (2nd Ed 1992).

[21]The rule of decision in this case is clearly federal. The only competing interest of the Commonwealth is purely procedural. See Henry v. Mississippi, 379 U.S. 443, 447 (1965); Fay v. Noia, 372 U.S. 391, 432 (1963).

culture, history and idiosyncrasy." App. p. 63, 81.

Due to the foregoing, we find it appropriate to address the primacy of the First Amendment over conflicting state statutes, as established in that Court's own opinions.[22]

Aponte Martínez v. Lugo 100 P.R.R. 281 (1971) made specific citation to classic First Amendment case law, and faced with having to pinpoint the applicability of federal standards, held:

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[22]For example, Torres Silva v. El Mundo, Inc. 6 Off.Trans. 581 (1977) refers to First Amendment standards in the libel context discussed in New York Times v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974). It recognizes that states and Puerto Rico must conform to the rules of New York Times and its progeny: "We have seen how the civil liability regime established in the Libel and Slander Act [of 1902], 32 L.P.R.A. § 3141 et seq. has been gradually modified by these constitutional doctrines which proscribe the presumption of malice, no-fault liability, and the presumption of damages." Id. at 592.

> We make effective in Puerto Rico, insofar as applicable, the guarantees of the First Amendment which are protected by the Fourteenth Amendment in the federal states. In addition to so doing because of our own conviction, it would be illusory to believe that the Supreme Court of the United States would not insist on affording protection in Puerto Rico to the fundamental constitutional rights of the citizens of the United States. Appellant, as we have stated, is a citizen of the United States. Furthermore, the right of free expression is one of the fundamental rights which pursuant to the Puerto Rican Federal Relations Act shall be honored in this country to the same extent as if Puerto Rico were a state of the federal Union. 64 Stat. 319 (1950); §7, 61 Stat. 772 (1947). Id. at 285. (Underlining ours).

Puerto Rico's Constitution, adopted in 1952, incorporates "all the historically established law concerning freedom of speech." (Id. at 289). This includes not only this Court's First Amendment case law, (which the opinion extensively cites with approval), but also "the probably more valuable part of the

political and constitutional history of that country from its origin as a number of English colonies. That historical background also includes the best Western constitutional thought and tradition." (Id. at 290). (Underlining ours). The Court definitely did not sound as if it were describing an uninvited guest.

Soto v. Secretary of Justice, 12 Off. Trans. 597 (1982), analyzes this Court's pronouncements regarding First Amendment access and derives a presumption of openness regarding government affairs, documents and information:

> [N]o legislation devoid of the adequate standards for determining the type of document or information that shall be subject to public scrutiny, and that, contrariwise, establishes an absolute confidentiality rule, may overcome the stringency of the constitutional clause under discussion. (Underlining in the original). Id. at 619.

Soto recognizes a presumption of

openness that applies to all branches of government, even the Executive.[23] See dissenting opinion of Judge Hernández Denton, App. 177, to the effect that Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980) and Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), do not have "the broadness and strength" of Soto, after which, "secrecy in public affairs is the exception and not the rule." App. 178.

4. The Ruling in Press-Enterprise II

This Court's determinations leading up to Press-Enterprise II are indicators of the elements that the Court recognized in pretrial proceedings "as they are

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[23]Compare El Día, Inc. v. Hernández Colón, (1st Cir 1992) 963 F.2d 488, 495 ("we seriously question whether Richmond Newspapers and its progeny carry positive implications favoring rights of access outside the criminal justice system").

conducted in California": accusatory, adversary, trial-type proceeding, assistance of counsel, the accused is present and given procedural safeguards; witnesses are examined and a judge decides as neutral arbiter.

When a preliminary hearing shows these attributes, the presumption of openness applies. This Court analyzed the countervailing interests and the balance was drawn, with a determination that qualified access is guaranteed under the First Amendment. This analysis was done with specific reference to the constitutional dimension of the right of access to this type of proceeding, not for California hearings exclusively.

Those preliminary hearings that share the substantive elements set forth by this Court must be open, unless there is reason

to close.[24] Distilled to its essence, the Court below recurred to labels which are clearly not descriptive of the functional characteristics of Rule 23 hearings, and which additionally had never before been used by that Court. The case law in its entirety does not give sustenance to calling the hearing "investigative".[25] The text of the Rule does not provide for

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[24]An important element, the rules regarding closure, are of passing importance at this time.

[25]The 1958 Judicial Conference that recommended the adoption of Rule 23 did not discuss, or make passing reference, to the fact that instead of public, there would be private hearings. App. 97. No trace remains of any debate on the matter, or evidence that the members of the Conference therefore had some or **any thoughts** on the subject. There is no record of what criminal process was being emulated, that provided for an adversary preliminary hearing, but to be held in secret. It is fitting, perhaps, that a Conference that silently approved of secret proceedings without record, would itself remain silent on the record regarding that decision.

investigation by any person.

CONCLUSION

Rule 23 hearings are clearly the adversary, trial-type hearing to which the holding of Press-Enterprise II applies. That case refrained from taking into account state labels or procedures in finding the essential elements of what is a preliminary hearing "as conducted in California." It was clearly not intended for states to find procedural distinctions in order to evade its holding.

The Court below, aware of the analytical focus imposed by Press-Enterprise II, strains to find differences between both proceedings, and was forced to locate merely procedural distinctions that are clearly of no importance under that case's holding.

Although this Court has shown

deference for the Commonwealth's laws in matters related to its civil law tradition, First Amendment rights are not the type that must bow automatically to any state statute or interest. We have referred to case law of Puerto Rico, interpreting the Commonwealth Constitution as incorporating the precedents and the philosophy of First Amendment rights, and therefore recognizing the supremacy of this Court's case law. Thus, application of the First Amendment's minimum standards must be recognized not only on the grounds that they are fundamental (Posadas), but also because the Commonwealth Constitution signifies the direct incorporation of the precedential interpretation of this Court.

Once this Court has struck a balance between two constitutional interests, and held that a specific procedure must be used to harmonize them, the Commonwealth

of Puerto Rico is constrained to follow this Court's interpretation, to the same extent, under the same circumstances, and for the same basic reasons as the States. Rule 23(c) closure would not survive if enacted by any of the 50 States.

Petitioners respectfully request that this Court consider the present Petition and in due course, after consideration of the issues raised herein, issue a Writ of Certiorari to the Supreme Court of Puerto Rico, reversing the judgment issued below on July 8, 1992, and entering judgment in favor of Petitioners.

Respectfully Submitted in Washington, D.C., this 13th day of November, 1992.

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